CAPITAL MUSIC CENTRE (EAST COAST) SDN. BHD.

v.

KOH CHIT KIN & ANOR.

HIGH COURT BORNEO, TAWAU
ABU MANSOR ALI J
[CIVIL SUIT NO. T. 188 OF 1985]
18 JUNE 1986

CIVIL PROCEDURE: *Application under O.18 r. 19 of Rules of the High Court 1980 - When such application will be allowed.*

The plaintiffs/applicants sought an order that the defence and counterclaim of the 1st and 2nd defendants/respondents be struck out under O. 18 r. 19 of the Rules of the High Court 1980. The application and reply were by affidavits. The applicants had entered into a contract to sell to the defendants musical equipment and furniture listed in a schedule to the agreement. A sum of RM50,000 was paid on signing of the agreement and possession of the subject matter of the agreement was handed over to the respondents. RM43,000 representing the balance sum due was not paid on the due date despite reminders. A representation had been made that the applicants were holders of the Yamaha franchise and that it would be handed over to the respondents. The applicants argued that at no time had the defendants rescinded the contract, and that the respondents were under a duty either to affirm or to rescind the contract on discovery of the misrepresentation. The respondents had made no complaint nor had they taken steps to return the subject matter of the contract. When a demand was made to settle, they undertook to do so but reneged on their assurance. The applicants' Counsel further submitted that, even after the respondents came to know of the misrepresentation, they continued to use the equipment and indeed sold some of it. The submission on behalf of the applicants was that the respondents by their conduct had affirmed the contract and thereby lost their right to rescind. The respondents not having claimed any damages and only rescission being prayed for, Counsel for the applicants submitted that the counterclaims of the 1st and 2nd respondents were unsustainable. The respondents while conceding that they did not plead rescission, denied that they affirmed the contract.

Held:

Pleadings will not be struck out under the Rules unless they are not only demurrable but significantly worse, that is to say no legitimate amendment can save them from being demurrable. Misrepresentation was admitted by Counsel for the applicants and if the counterclaim were struck out, this would necessarily result in the erasure of allegations which were in fact true. What was the damage due to the misrepresentation, was there affirmation under the contract, these were matters which could only be determined after trial on the question of the franchise as to the non-existence of a prayer for damages, this could not be classified as worse than demurrable. The Court would not presume without evidence that there was affirmation and ride roughshod the admitted issue of misrepresentation, possibly intermingled with issues of incidence of damage and quantum of damage.

[Application dismissed.]

Cases referred to:

Republic of Peru v. Peruvian Guano Co. 36 Ch D 496
Wenlock v. Moloney & Ors. [1965] 2 All ER 871

Legislation referred to:
Contracts Act 1950, s. 19(1)
Rules of the High Court 1980, O. 14, O. 18 r. 19

For the plaintiffs/applicants - Joseph Lee Henn Shen: M/s. Joseph Lee & Co.
For the defendants/respondents - Simon K.Y. Shim; M/s. Shim Fattah Pang & Co.

JUDGMENT

Abu Mansor Ali J:

By their summons-in-chambers dated 14 June 1986 the plaintiffs/applicants applied for final judgment under O. 14, Rules of the High Court 1980, or alternatively they applied for an order that the defence and counterclaim of the 1st and 2nd defendants/respondents be struck out under O. 18 r. 19 of those Rules on the ground that (a) it discloses no reasonable cause of defence on claim; (b) they are scandalous, frivolous and vexatious; and (c) that it is an abuse of the process of the Court.

This matter was adjourned to open Court for argument and on 10 April 1986 Counsel for applicants did not proceed with the O. 14 application but proceeded only instead with the O. 18 r. 19 application. At the end of the argument I dismissed the applicants' application holding that the defence and counterclaim should stand and there were triable issues to go to trial.

On 18 June 1986 the applicants prayed for leave to appeal to the Supreme Court as this matter was below RM100,000. After argument I granted leave.

The applicants' application to strike the defence and counterclaim of 1st and 2nd respondents was supported by affidavit in support (4A), by further affidavit in support (6) and opposed by the respondents in affidavit in reply (7) and a further affidavit in reply (8).

The applicants alleged that on 1 December 1983, they entered into an agreement (TCS-1) ("said agreement") with 1st and 2nd respondents for the sale and purchase of musical equipments, furniture, listed in the schedule to the said agreement. The purchase price was agreed at RM93,000 as per the price listed in the said schedule. Upon signing the agreement the 1st and 2nd respondents paid RM50,000, thereafter the 1st and 2nd respondents took possession of the equipments and furniture. Under cl. 2(b) of the said agreement, according to the applicants, the balance of RM43,000 was to be paid within six months from the date thereof. When it was due on 1 June 1984, the 1st and 2nd respondents failed to pay despite reminders.

The applicants said no representation was made in respect of franchise although this was later conceded by Counsel for applicants that in fact there was such representation as regards the applicants being holder of Yamaha franchise and that applicants would hand over the franchise to the respondents.

Applicants in particular applied paras. 3, 4, 5, 6, 7, 8 and 10 of the defence and counterclaim, enclouse (2), of 1st and 2nd respondents be struck out on those grounds stated.

In the further affidavit filed on behalf of the applicants they alleged that in spite of the fact that franchise was not handed over it was still possible for respondents to carry on their business and they denied that their stock and studio were of no value. The applicants also alleged that they had received no complaint from the respondents and since 1 December 1983, when the respondents had taken possession of the equipments, furniture and studio,

respondents had taken no steps to return them to the applicants. It was only when a demand was made to settle the balance did the respondents say they would settle but failed to do so.

The applicants contended that at no time did respondents suggest that they had rescinded the contract. Applicants' Counsel further contended that on discovery of the representation the respondents' duty was either to affirm or to rescind. He referred the Court to s. 19(1) of the Contracts Act, 1950. Rescission however, they said, should be done within reasonable time. Counsel submitted that respondents knew of the misrepresentation on 31 July 1984 when they received TVT5 of enclouse (7). They continued to use the equipment and in fact had sold some of them. Applicants' Counsel submitted by their conduct the respondents had affirmed the contract and they therefore had lost their right to rescind. They alleged that the respondents had not claimed any damages. As only rescission in the defence is prayed Counsel submitted that counterclaim of 1st and 2nd respondents are bad and therefore unsustainable.

For the respondents' Counsel he conceded that they did not plead rescission but denied that his client affirmed the contract.

We come to the statement of defence and counterclaim in paras. 3, 4, 5, 6, 7, 8 and 10 thereof that the applicants sought to strike off. In paras. 3, 4, 5, and 6 the respondents alleged misrepresentation by the applicants. Then under para. 7 as a result of an amendment allowed the respondents further or in the alternative alleged fraudulent misrepresentation having regard to their averments in paras. 3, 4, 5, 6 and 7 thereof. In para. 8 the respondents alleged and would say that the said purchase price of RM93,000 did not represent a genuine sale of the equipments and stock or did not honestly show the amount to be *bona fide* and legitimate sale of goods as listed in the schedule. Then under the heading "counterclaim", para. 10, the respondents say by reason of what they had averred the sale was worthless or worth far less than RM93,000 and because of what had been stated in paras. 3, 4, 5 and 6 thereof the respondents had to deal themselves with Yamaha head office in Singapore before they could sell Yamaha products and conduct music lessons in Yamaha's name. They therefore experienced loss.

It is true that apart from their para. 8 and under counterclaim para. 10 the respondents did not pray for damages as an item but claim only rescission and the return of RM50,000 interest and costs.

In the *Republic of Peru v. Peruvian Guano Co.* 36 Ch D 496, Chitty J held that no precise legal definition can be found as yet as to the meaning of "no reasonable defence" or "frivolous or vexatious"; but as can be observed a pleading will not be struck out under the Rules "unless it is not only demurrable but something worse than demurrable" that is to say that no legitimate amendment can save it from being demurrable.

The applicants' Counsel conceded there was misrepresentation but she alleged by conduct the respondents had affirmed the contract. This was strongly denied by the respondents. It was clear to the Court that to prove that the respondents had affirmed there must be evidence and this can only be led at the trial when the witnesses could be examined and cross-examined fully. What amounts to affirmation and what is the law applicable to such? These are questions of law and fact for the trial Judge later. This misrepresentation as stated was admitted by Counsel for applicants. Can these paras. 3, 4, 5 and 6 be now struck out in view of the admission as the effect of such step would definitely be the erasure of such allegations which happened to be true. If rescission is no longer possible could there be damages in

view of the admitted misrepresentation? Then the respondents contended that the price of RM93,000 for equipment and stock was not genuine price of such but included the price of handing over of the Yamaha franchise. The part of this misrepresentation had been admitted by Counsel and clear from the Exhibits TVT1 to TVT4, enclouse (7). This paras. 8 and 10 of the defence and counterclaim in the Court's view questions the very basis of the fixing of the price of RM93,000. If that is not the price what would be correct price and since the misrepresentation had been conceded how much of this fact did influence the price that had been determined? There was the allegation by the respondents that because of the non-availability of the promised franchise they could not hold classes in Lahad Datu and Semporna. What is the damage for these had to be determined by evidence at the trial if the issues were to be fully determined.

As to the prayers of damages not being there it is not worst than demurrable if we apply the test of Chitty J in the *Republic Peru v. Peruvian Guano* case (*supra*). The substance of the claim for damages is already being made in para. 8 and counterclaim therefor in para. 10 and all that needed to be done is to include in the prayers as to damages which is within the trial Judge's discretion to allow in the event the trial Judge is mindful to allow it and in case he finds that restitution is no longer possible. In dismissing the application to strike the defence and counterclaim the Court had regard to the case of *Wenlock v. Moloney & Ors.* [1965] 2 ALL ER 871 (not cited by parties) where an appeal was allowed by the Court of appeal because the course taken therein amounted to trial in chambers and was neither authorised by the relevant rules nor an exercise of the inherent jurisdiction of the Court. Similarly in this matter the Court could not presume without evidence there was affirmation and ride roughshod of the admitted issue of misrepresentation possibly bringing with it issues of damages and how much. Its duty was to ask was there defence and counterclaim? Its answer was in the affirmative. It therefore dismissed the application. Applicants appeal.

Also found at [1988] 2 CLJ 287